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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

YUNG-SHEN STEVEN LEE,

Plaintiff and Appellant,

v.

SPYGLASS HILL COMMUNITY  
ASSOCIATION,

Defendant and Respondent.

G056283

(Super. Ct. No. 30-2017-00921587)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Geoffrey  
T. Glass, Judge. Affirmed.

Sterling Scott Winchell for Plaintiff and Appellant.

Pettit Kohn Ingrassia Lutz & Dolin and Matthew C. Smith for Defendant  
and Respondent.

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## **INTRODUCTION**

Plaintiff Yung-Shen Steven Lee appeals from a judgment entered after the trial court granted a motion for summary judgment brought by defendant Spyglass Hill Community Association (Spyglass). Lee alleged in his complaint that Spyglass had engaged in negligent or deliberate conduct resulting in a default judgment against him and causing his home to be levied upon and sold at an execution sale without his knowledge.

We affirm the judgment on the ground the claims asserted in Lee's complaint arose out of conduct protected by the litigation privilege of Civil Code section 47, subdivision (b) (section 47(b)). Because we affirm based on the litigation privilege, we do not address whether the claims asserted in Lee's complaint were released by a settlement agreement or were barred by res judicata.

## **FACTS AND PROCEDURAL HISTORY**

### **I. Spyglass's Lawsuit and Lee's Cross-Complaint**

Lee was the owner of real property at 10 Morro Bay Drive, Corona Del Mar, California, which was located within the common interest development known as Spyglass Hill. Pursuant to its Covenants, Conditions and Restrictions (CC&Rs), Spyglass charged regular and special assessments to its residents, including Lee. Beginning in 2007, Lee stopped making assessment payments.

Between 2007 and 2009, Lee received several written notices that his assessments were delinquent. Lee acknowledged he had received the notices and his obligation to pay the assessments, but believed the amount assessed was incorrect. He would not pay the assessments because he disagreed with the amount.

In May 2009, Spyglass filed a lawsuit against Lee (the Spyglass lawsuit) to recover \$7,800 in unpaid assessments and to foreclose an assessment lien. Spyglass was represented in the lawsuit by the law firm of Fiore, Racobs & Powers APC (Fiore

Racobs). Thereafter, attempts were made to serve process on Lee, and some 24 attempts at personal service were made from June 2 through October 26, 2009. In some instances, Lee refused to acknowledge he was at home and refused to open or answer the door. Fiore Racobs also tried to serve Lee by mailing him a notice and acknowledgment of receipt pursuant to Code of Civil Procedure section 415.30. Lee did not maintain a mail box at the property and attempts to serve him by mail were returned stamped “forwarding address is expired.”

In November 2009, Spyglass filed an ex parte application for publication of summons, which included a declaration from a registered process server. In June 2010, Spyglass obtained, by default, a judgment of foreclosure of the assessment lien against Lee. Based on the default judgment Spyglass had obtained against Lee, a writ of sale issued and, on July 14, 2011, the property was sold at a sheriff’s sale to Howard Rich, who was the highest bidder. Rich brought an unlawful detainer action against Lee. In the Spyglass lawsuit, Lee brought a cross-complaint against Spyglass and Rich.

In March 2012, the trial court in the Spyglass lawsuit granted Lee’s motion to set aside and vacate the default and default judgment. In April 2012, the trial court granted Lee’s motion for restitution and cancellation of the sheriff’s deed of sale. The court ordered that the sheriff’s deed issued to Rich be cancelled as “void *ab initio*” and that restitution be made to Rich.

In May 2012, Rich filed a cross-complaint in the Spyglass lawsuit asserting a cause of action to quiet title against Lee. Rich’s cross-complaint alleged, as the basis for title, the sheriff’s certificate of sale of real property and the sheriff’s deed of sale.

Lee filed a second amended cross-complaint in the Spyglass lawsuit in August 2014. He alleged he received no actual notice of the Spyglass lawsuit, the default judgment, or the sheriff’s sale, and that the manner in which Spyglass obtained the default judgment and procured the sheriff’s sale constituted negligence and willful misconduct.

## **II. The Settlement Agreement Between Spyglass and Lee**

Spyglass moved to strike Lee's second amended cross-complaint under the anti-SLAPP statute, Code of Civil Procedure section 425.16. Before the motion was heard, Spyglass and Lee reached a settlement by which Lee agreed to dismiss his second amended cross-complaint with prejudice and release all claims against Spyglass in exchange for a waiver of costs. Spyglass and Lee signed a settlement agreement (the Settlement Agreement) in January 2015, and Lee dismissed the second amended cross-complaint with prejudice. .

The Settlement Agreement includes a release by which Lee agreed to release Spyglass "from any and all current or potential claims, demands, and causes of action, including, but not limited to, any claims, whether known or unknown, that arise out of or are related in any way to any of the facts and circumstances described in [Lee's second amended cross-complaint]." The Settlement Agreement also has a Civil Code section 1542 waiver and a release of "all matters, and all claims, which do now exist, may exist, or heretofore have existed between the Parties, subject to the terms expressly stated in this Agreement."

After the settlement with Spyglass, Lee continued to litigate his disputes with Rich. In 2015, Rich dismissed his cross-complaint without prejudice and filed a notice of appeal to challenge the order granting Lee's motion for restitution and to cancel the sheriff's deed. In *Lee v. Rich* (2016) 6 Cal.App.5th 270, a majority of a panel of this court reversed the order granting Lee's motion for restitution and cancellation of the sheriff's deed of sale and thereby upheld the sale of Lee's home to Rich.

## **III. Lee's Complaint Against Spyglass**

In May 2017, after the sheriff's deed of sale to Rich had been reinstated, Lee filed a complaint against Spyglass for negligence, negligent infliction of emotional distress, and abuse of process. Lee's complaint alleged that in July 2009, Spyglass

drafted a summons and complaint seeking \$7,955.50 for delinquent assessments, late charges, collection costs and attorney's fees, and mailed that complaint, along with a Notice of Acknowledgement of Receipt and cover letter, to 10 Morro Bay Drive, Corona del Mar. The complaint alleged that at the time of this mailing, Spyglass knew Lee's official mailing address was a post office box in Newport Beach, Spyglass had successfully mailed past correspondence to Lee at his official mailing address, and Lee's official mailing address was on file with Spyglass.

The complaint alleged, "on this occasion, for reasons unknown to anyone other than [Spyglass]," Spyglass chose to mail all correspondence to the street address instead of the official address, and "[t]he mail came back . . . as 'undeliverable.'" As a consequence, following service by publication, entry of default and a default judgment were entered against Lee, who did not receive notice because it was sent to his street address. The property was sold at a sheriff's sale in July 2011 for the high bid of \$210,000 although the fair market value was \$1.8 million. The trial court granted Lee's motion to cancel the sheriff's deed; however, this court reversed that decision and the sheriff's deed was ultimately reinstated, "thereby divesting Steven Lee of ownership of the Property."

Under the negligence cause of action, the complaint alleged Spyglass breached its duty of care "by failing to do proper investigation of [its] own files or otherwise to determine and discover that there was a better or more likely address, namely [Lee's] official address, for giving legal notice to Mr. Lee of the fact that he was being served with a summons and complaint, that he was being served with a request for service by publication, that he was being served with a notice of entry of default and an entry of judgment. Instead, [Spyglass] employed methods which [Spyglass] knew or should have known were not likely to give Steven Lee notice of any of these important legal documents, particularly given the fact that [Spyglass] knew that all notices sent to the address they repeatedly chose to use would be returned as undeliverable." The

complaint also alleged Spyglass was negligent by failing to provide the sheriff with Lee's official address, which caused the sheriff to serve the notice of levy and notice of sale "to an address from where all mail would be returned [as] undeliverable." The negligent infliction of emotional distress cause of action was based on same conduct.

Under the abuse of process cause of action, the complaint alleged that Spyglass breached its duty to use reasonable care to provide service of process in three ways:

1. Spyglass deliberately chose not to serve Lee at his official address thereby "ensuring that Mr. Lee would not become aware of a summons and complaint, a request for service by publication, a notice of entry of default and an entry of judgment."

2. Spyglass brought an ex parte request for an order of service by publication of the Spyglass complaint "without showing of urgency or irreparable harm." The ex parte request was, according to the complaint, supported by a declaration which "deliberately misrepresented" that Spyglass "did not know of a better address" at which to serve Lee than his street address.

3. Spyglass intentionally failed to provide the sheriff with Lee's official mailing address, which caused the sheriff to serve the notice of levy and notice of sale at the street address.

Spyglass moved for summary judgment on three grounds: (1) the claims asserted in Lee's complaint were released by the Settlement Agreement; (2) the claims asserted in Lee's complaint are barred by res judicata; and (3) the claims asserted in Lee's complaint are based on conduct protected by the litigation privilege of section 47(b). The trial court granted the motion for summary judgment, judgment was entered in favor of Spyglass, and Lee timely appealed from the judgment.

## DISCUSSION

The litigation privilege applies to any communication (1) made in judicial or quasi-judicial proceedings (2) by litigants or other participants authorized by law (3) for the purpose of achieving the objects of the litigation and (4) having some connection or logical relation to the proceedings. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057 (*Rusheen*).) “Thus, ‘communications with “some relation” to judicial proceedings’ are ‘absolutely immune from tort liability’ by the litigation privilege.” (*Ibid.*) The litigation privilege is absolute and bars all tort causes of action except malicious prosecution. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 322.)

In *Rusheen*, the California Supreme Court, in reviewing a judgment arising from an order granting an anti-SLAPP motion, addressed two issues: “(1) whether actions taken to collect a judgment, such as obtaining a writ of execution and levying on the judgment debtor’s property, are protected by the litigation privilege as communications in the course of a judicial proceeding; and (2) whether a claim for abuse of process based on the filing of an allegedly false declaration of service is barred by the litigation privilege on the ground the claim is necessarily founded on a communicative act.” (*Rusheen, supra*, 37 Cal.4th at p. 1055, fn. omitted.)

The Supreme Court explained that the litigation privilege of section 47(b) protects only acts that are communicative, and, therefore, the threshold issue in determining whether the litigation privilege applies is whether the defendant’s alleged conduct is communicative or noncommunicative. (*Rusheen, supra*, 37 Cal.4th at p. 1058.) Pleadings and process, as well as filing false or perjurious testimony or declarations, are considered privileged. (*Ibid.*) There were conflicting Court of Appeal opinions on the issue whether postjudgment collection activity was communicative or noncommunicative. (*Id.* at pp. 1059-1060.)

The Supreme Court also explained that even if the challenged conduct was a noncommunicative physical act, a court must look to whether the gravamen of the

abuse of process cause of action was communicative or noncommunicative conduct. (*Rusheen, supra*, 37 Cal.4th at p. 1061.) For purposes of the litigation privilege, the gravamen is the act or acts allegedly producing the injury. (*Id.* at p. 1058.) The court concluded, “if the gravamen of the action is communicative, the litigation privilege extends to noncommunicative acts that are necessarily related to the communicative conduct.” (*Id.* at p. 1065.) “The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature.” (*Id.* at p. 1058.)

The gravamen of the abuse of process cause of action in *Rusheen* was not the act of levying on the judgment, “but the procurement of the judgment based on the use of allegedly perjured declarations of service.” (*Rusheen, supra*, 37 Cal.4th at p. 1062.) The court assumed, without deciding, that levying on property is a noncommunicative act but noted “the execution and levying process may also involve communications such as the delivery of the writ and statements or representations made to the levying officer or other party.” (*Id.* at p. 1061 and fn. 3.) The noncommunicative act of levying on the judgment was necessarily related to the communicative act serving as the gravamen of the complaint and therefore was subject to the litigation privilege. “[B]ecause the execution of the judgment did not provide an independent basis for liability separate and apart from the filing of the false declarations of service, the gravamen of the action was the procurement of the judgment, not its enforcement. Thus, the enforcement of the judgment in reliance on the filing of privileged declarations of service was itself privileged.” (*Id.* at p. 1065.)

In this case too, it was the procurement of the default judgment that was the gravamen of Lee’s claims against Spyglass. The judgment, Lee alleged, was procured by means of serving Lee at the wrong address, filing false or perjured declarations, wrongly seeking and obtaining by ex parte request an order for service of publication based on



misrepresentations, and providing the sheriff with inaccurate information. Service of process, mailing notices, obtaining an order for service by publication, and submitting declarations are all communicative acts subject to the litigation privilege. (*Rusheen, supra*, 37 Cal.4th at p. 1058.) Statements and representations made by Spyglass or its agents to the levying office (here, the Sheriff) also are communicative acts. (*Id.* at p. 1061 and fn. 3.) Because the gravamen of Lee’s complaint was privileged communications, the litigation privilege extends to the necessarily related noncommunicative act of levying on the property by means of a sheriff’s sale. (*Id.* at pp. 1062-1063.)

#### **DISPOSITION**

The judgment is affirmed. Respondent to recover costs on appeal.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.